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Nos. 82-869 and 82-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*,
Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

EAGLE-PICHER INDUSTRIES, INC.,
Conditional-Cross Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Conditional Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO THE PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

1. How should the enormous potential liability for the historical use of asbestos related products be funded by asbestos manufacturers and their insurance companies?

2. Are interstate contracts of insurance providing millions of dollars of benefits for injured tort claimants to be interpreted according to each Circuit Court of Appeal's perception and announcement of "public policy" or by resort, under *Erie* principles, to traditional contract doctrines to give effect to the intentions of the parties?

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BRIEF OF RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO THE PETITIONS FOR CERTIORARI

SUMMARY OF ARGUMENT

Liberty Mutual Insurance Company,[1] alone among the hundreds of manufacturers, distributors, insurers, and reinsurers involved in the epidemic asbestos product liability litigation, is subject to three different and irreconcilable decisions from three Courts of Appeals. Unlike other major legal issues of national importance upon which the courts of this country develop a uniform approach defining commercial obligations, the issue of insurance coverage for asbestos related disease has generated decisions which only further confuse and delay any meaningful resolution. Only the Supreme Court, by the exercise of its supervisory powers over important national legal issues, can bring an end to the current chaos in the federal court system.

ARGUMENT

The issue of a manufacturer's liability for asbestos related diseases has been before this Court but once in the past ten years in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) while the issue of an insurance company's contractual obligations to pay the liabilities imposed upon asbestos manufacturers has been before this Court in four separate cases announcing three distinct and irreconcilable rules within the previous twelve months. *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982);

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[1] Pursuant to Rule 28.1, Respondent Liberty Mutual Insurance Company states that it has no parent company; its affiliated and subsidiary companies are Liberty Mutual Fire Insurance Company, Liberty Life Assurance Company of Boston, Liberty International Agency, Liberty Northwest Insurance Corporation, Liberty Mutual Insurance Company (Massachusetts) Limited, Helmsman (Underwriting) Limited, Liberty Mutual (Bermuda) Limited, Liberty Mutual Management (Bermuda) Limited.

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982); *Keene v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 102 S.Ct. 2024 (1982); *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company*, 682 F.2d 12 (1st Cir. 1982).

The continued presence of this type of case on the Supreme Court docket, the inability of the federal courts to grapple with the important legal and policy issues in these cases to reach a uniform result, the dozens of pending cases over identical issues around the country,[2] the petitions in the Bankruptcy Court of at least three asbestos manufacturers alleging that the absence of a resolution to the insurance coverage litigation is at least a contributing factor to their financial problems,[3] and the appearance of dozens of amici in the present case all suggest that this is a matter worthy of Supreme Court review.[4]

All parties, including Liberty Mutual, are mindful of this Court's admonishment in *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202 (1938) that ordinarily, a conflict among the circuits in diversity cases, because

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[2] See: Petition For Certiorari of Philip Alan Froude, et al. No. 82-869, Appendix C.

[3] *In Re Johns-Manville Corporation, et al.*, Case No. 82 B 11556 et seq. (S.D.N.Y. filed August 26, 1982).

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[4] Indeed, the very notion of the twenty major corporations led by Armstrong World Industries filing an amicus curiae brief in *opposition* to a petition for certiorari demonstrates the importance of the insurance coverage issues to the giants of interstate commerce. Should certiorari be granted, Liberty Mutual will address the many factual and legal distortions and misrepresentations contained in the brief of the Armstrong World Industries, et al. as amici.

the issues are controlled by state law, is insufficient reason to grant certiorari. However, as stated in *Forty-Eight Insulations*, *Porter* and *Keene* these are not *ordinary* diversity cases which fall within the contemplation of the *Ruhlin* pronouncement. Certainly no one, not even the Justices of this Court, could have foreseen the morass of litigation generated by asbestos product liability litigation nor the complex social issues of funding the transfer of wealth to injured claimants and spreading the cost of such funding to society.

The Courts of Appeals in *Forty-Eight Insulations*, *Porter*, and *Keene* viewed the asbestos product liability litigation as a social problem and acted, by judicial fiat contrary to the concepts of federalism dictated by *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), in enacting a social funding mechanism for asbestos claimants. The Sixth, Fifth, and District of Columbia Circuits, respectively, erred in that regard but the First Circuit in deciding the *Eagle-Picher* case met its *Erie* responsibilities and, with deference to the parties intentions, interpreted the plain meaning of the contracts. In so doing, it announced the "manifestation" theory of insurance coverage as fulfilling the parties' intentions.

Liberty Mutual, although it considers the opinion of the First Circuit to be correct on the merits and opposes the position of the Froude Petition and the Eagle-Picher Conditional Cross-Petition, nevertheless supports the concept of review by this Court. As a party to *Forty-Eight*, *Keene*, and *Eagle-Picher*, Liberty Mutual is the only entity in the country, among the thousands of manufacturers, distributors, claimants, insurers, and reinsurers, which is subject to three differing and irreconcilable interpretations of virtually identical contract language. Currently, over one hundred past and present insureds are reporting asbestos related products liability claims to Liberty Mutual. As a major insurer, Liberty Mutual wishes to honor all our contractual obligations, yet to date,

the federal court system has been unable to define those obligations. The present lack of definition, clarity, and predictability in the asbestos insurance coverage controversy can be traced directly to the Circuit Courts of Appeals ignoring the direction of *Erie* and fashioning decisions upon individual perceptions of the social equities involved in this commercial contract dispute instead of resorting to time-tested doctrines of state contract law. Only review by this Court can end this adventuresome social legislating by the Circuit Courts and restore predictability to federal court litigation. Absent any direction from this Court, the commercial contractual obligation of insurers as they relate to asbestos related product liability claims will continue to clog the courts of this country and the agony of compensating victims of asbestos disease will be prolonged unnecessarily.

CONCLUSION

Although it supports on the merits the decision rendered below by the First Circuit, Liberty Mutual acknowledges its recognition that in the interest of sound judicial policy and in order to promote the resolution of the insurance coverage controversy to expedite compensation for victims of asbestos disease, this Court has reason to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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